

SB

424

SENATE COMMITTEE REPORT

FURTHER

DATE TURNED INTO OFFICE _____

3/10/88
Mr. President:

Finance Committee considered SB 424

procurement by state agencies from certain entities

and recommended

[] replace with _____ CS _____) [] same title
[] or adopt _____ CS _____) [] new title

[] attached amendment(s) and

[] do pass

[] do not pass

[] no recommendation

[] individual recommendations

[] further referral to _____

[] letter of intent adopted _____

Committee [] attached or [] adopted fiscal note(s)

[] new [] updated or [] previous

[] zero [] fiscal impact

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

Chairman signature and recommendation

[] Committee Backup attached

SENATE COMMITTEE REPORT

FURTHER Finance

DATE TURNED INTO OFFICE _____

3/2/88
Mr. President:

L&C

Committee considered SB 424

procurement by state agencies from certain entities

and a majority of the Committee recommends the
and recommended *CS & RA CS be adopted & do pass.*

replace with _____ CS _____) same title
 or adopt _____ CS SB 424 (C & RA)) new title

attached amendment(s) and

do pass

do not pass

no recommendation

individual recommendations

further referral to _____

letter of intent adopted _____

Committee attached or adopted fiscal note(s)

new updated or previous

zero fiscal impact NO

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

[Handwritten signatures]

Michael J. No-Rec.

Tim Kelly - Do Pass
Chairman signature and recommendation

Committee Backup attached

SENATE COMMITTEE REPORT

FIRST COMMITTEE OF REFERRAL

Date of 2/25/88 5-DAY NOTICE
IN ACCORDANCE WITH UNIFORM RULE 23

FURTHER: L&C
FINANCE

**FISCAL NOTE(S) ATTACHED yes **
IN ACCORDANCE WITH AS 24.081035
(see below)

2/12/88 DATE TURNED INTO OFFICE _____

Mr. President:

C&RA Committee considered SB 424

procurement by state agencies from certain entities

and recommended: *majority*

replace with CS for SB 424 (CRA) same title
 attached amendment(s) and new title

do pass

do not pass

no recommendation

individual recommendations

further referral to _____

letter of intent adopted and attached

** Committee attached or adopted fiscal note(s)
 zero fiscal impact

MEMBERS SIGNING DO PASS
[Signature]
[Signature]

OTHER RECOMMENDATIONS
7 [Signature] No Rec-

[Signature]
Chairman signature and recommendation

Committee Backup Attached

Offered: 3/2/88
Referred: Labor and Commerce and Finance

5-1771B

Original sponsors: Jones, Fischer,
Fanning and Abood

BY THE COMMUNITY AND REGIONAL
AFFAIRS COMMITTEE

1 IN THE SENATE

2 CS FOR SENATE BILL NO. 424 (C&RA)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to procurement by the Department of
7 Transportation and Public Facilities from certain
8 entities."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 * Section 1. AS 36.30 is amended by adding a new section to read:

11 Sec. 36.30.760. PROHIBITION AGAINST CERTAIN CONTRACT AWARDS. If
12 the Department of Transportation and Public Facilities solicits bids
13 for a construction contract over \$150,000 by issuing an invitation to
14 bid under AS 36.30.100 - 36.30.190 or a request for proposals under
15 AS 36.30.200 - 36.30.270, the Department of Transportation and Public
16 Facilities may not award the contract to a bidder or offeror who is a
17 state agency, a political subdivision of the state, a partnership
18 whose partners include a state agency or political subdivision of the
19 state, or a joint venture whose venturers include a state agency or
20 political subdivision of the state. In this section, "political
21 subdivision" includes school districts.

Introduced: 2/12/88
Referred: Community and Regional Affairs,
Labor and Commerce and Finance

5-1771A

1 IN THE SENATE

BY JONES AND FISCHER

2 SENATE BILL NO. 424

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

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7 from certain entities."

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13 proposals under AS 36.30.200 - 36.30.270, the agency may not award the
14 contract to a bidder or offeror who is another state agency, a politi-
15 cal subdivision of the state, a partnership whose partners include a
16 state agency or political subdivision of the state, or a joint venture
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18 state. In this section, "political subdivision" includes school
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STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CS SB424
PUBLISH DATE: *Senate 3/2/88*

REQUEST: FISCAL NOTE

Revision Date:
Title: An Act relating to procurement by state agencies from certain entities.
Sponsor: Jones and Fischer
Requestor: Sturgulewski

Agency Affected: DOT&PF
BRU:
Components:

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTURAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (THOUSANDS OF DOLLARS)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

Because of the relatively few examples the department can refer to where a municipality or state agency actively competed for a bid or professional service solicitation, this bill would appear to have minimal or no impact on staffing or cost. It could affect some operational functions of the department, which are further described on the next page.

Prepared by: *Jeffery C. Utlesen*
Jeffery C. Utlesen, Director
Division: Engineering & Operations Standards

Phone: 465-2951
Date: Feb. 29, 1988

Approved by Commissioner: *Mark A. Hill*
Agency: Department of Transportation and Public Facilities

Date: *3/1/88*

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Currently, the department has a number of relatively small operational-type contracts with other governmental agencies for a variety of purposes. These include contracts with local communities for docking of Marine Highway Vessels, terminal operations and ticketing for the Marine Highway system and contracts for maintenance and operations of airports and road systems. Other examples of disallowed inter-governmental contracting may occur depending on how the bill is interpreted. For example, if the department procures shipyard services at locations such as Ketchikan or Seward we may be viewed as being in violation of this proposed law. As each city controls a major shipyard, though leased to a shipyard service firm, legal questions may be raised as to an implied partnership or joint venture on the part of the city which owns or leases the shipyard facilities. A further potential conflict is with the anticipated selection of a southern terminus for the Alaska Marine Highway System. Many of the likely candidate sites involve a governmental entity, including the Alaska community of Hyder.

We believe the principal intent of this bill – to prevent governmental entities from competing in the construction arena – could be served while avoiding the types of conflicts described above with a simple language change. We suggest that the sentence on line 11 be amended as shown:

11 ...a state agency solicits bids for a construction contract over \$150,000 by issuing ...

With the change described above, the operational contracts described herein could continue while construction contracts would be subject to the limitations of public entity contracting as intended by this bill.

→ THIS HAS BEEN DONE IN THE CS. MJA

0-FN

ALASKA STATE LEGISLATURE

. 15th Legislature .. 2nd Session

SENATE... **BILL**..... NO. **424**.

By **JONES**.....

"An Act relating to procurement by state agencies from certain entities."

Introduced in the Senate ... **2/12**....., 19 **.88**...

HISTORY IN THE SENATE

19 88	Read first time and referred to Committee on										
2 12	C&RA, L&C, FINANCE										
	Reported back with recommendation that										
3 8	<i>C&RA explain w CS- 3 do pass, 1 no rec FIN to L&C</i>										
3 10	<i>L&C: 4 do pass could CS, 1 no rec, permit FY to Finance</i>										
	Read second time and										
	Read third time and										
	<table border="0"> <tr><td>PASSED</td><td>Effective Date</td></tr> <tr><td>Yeas</td><td>Yeas</td></tr> <tr><td>Nays</td><td>Nays</td></tr> <tr><td>Excused</td><td>Excused</td></tr> <tr><td>Absent</td><td>Absent</td></tr> </table>	PASSED	Effective Date	Yeas	Yeas	Nays	Nays	Excused	Excused	Absent	Absent
PASSED	Effective Date										
Yeas	Yeas										
Nays	Nays										
Excused	Excused										
Absent	Absent										
	Reconsideration Reconsideration not taken up										
	<table border="0"> <tr><td>PASSED</td><td>Effective Date</td></tr> <tr><td>Yeas</td><td>Yeas</td></tr> <tr><td>Nays</td><td>Nays</td></tr> <tr><td>Excused</td><td>Excused</td></tr> <tr><td>Absent</td><td>Absent</td></tr> </table>	PASSED	Effective Date	Yeas	Yeas	Nays	Nays	Excused	Excused	Absent	Absent
PASSED	Effective Date										
Yeas	Yeas										
Nays	Nays										
Excused	Excused										
Absent	Absent										
	Reported correctly engrossed Signed by President Sent to House										
	SECRETARY OF THE SENATE										

HISTORY IN THE HOUSE

19	Read first time and referred to Committee on										
	Reported back with recommendation that										
	Read second time and										
	Read third time and										
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Yeas	Yeas										
Nays	Nays										
Excused	Excused										
Absent	Absent										
	Reported correctly engrossed Signed by Speaker Returned to Senate										
	CHIEF CLERK OF THE HOUSE										

HISTORY IN THE SENATE

19	Received from House
	To enrolling
	Reported correctly enrolled
	Sent to Governor
 by Governor
	Chapter No.
	Filed with Lt. Governor

ALASKA STATE LEGISLATURE

Home Address
3813 Denali Street
Ketchikan, AK 99901
907-225-9082

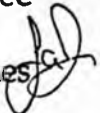


While in Juneau
P.O. Box V
Juneau, AK 99811
907-465-3743

Senator Lloyd Jones

MEMORANDUM

TO: Senate members,
Finance Committee

FROM: Senator Lloyd Jones 

RE: Senate Bill 424

I introduced SB 424, "An Act relating to procurement by state agencies from certain entities," because of my concern that state government should help the private sector, not hinder or compete with it.

In a nutshell, it was my intent with this piece of legislation to prevent municipalities from competing with private contractors on state jobs.

There have been a couple of instances lately where municipal organizations either by themselves or in conjunction with a partner have bid or wanted to bid on state projects. It is unfair to private businesses to compete with publicly funded, not-for-profit organizations.

This legislation does not prevent force-accounting or pass-throughs from occurring. Similarly, a political entity who was awarded a contract in a bid process would still have to pay Davis-Bacon wages. Thus, this bill would not cost government more money by allowing private enterprise to compete among themselves, rather than with municipalities.

This bill has the support of labor as well as management in the construction industry. Thank you for giving it your fullest consideration.



SKILL
RESPONSIBILITY
INTEGRITY

THE ALASKA CHAPTER
**ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, INC.**

BOX 92500 • ANCHORAGE, ALASKA 99509
TELEPHONE (907) 561-5354



3201 SPENARD ROAD
ANCHORAGE
WILLIAM E. SCHNEIDER
EXECUTIVE DIRECTOR

March 17, 1988

Testimony

Senate Finance Committee

SB 424: Procurement by the Department of Transportation and
Public Facilities from certain entities.

Thank you Mr. Chairman. For the record my name is Resa Jerrel, and I am the Director of Governmental Relations for the Associated General Contractors of Alaska. We appreciated the opportunity to testify in favor of this legislation. I would like to give you the background on the need for this legislation.

Early last fall we encountered a situation that quite frankly we had not encountered before and it disturbed a lot of people in the construction industry.

The Department of Transportation and Public Facilities put out to competitive bid an airport improvement project, the bid opening was September 15th, and to a lot of people's surprise, the apparent low bidder of \$1.8 million was a Joint Venture consisting of a community, a village corporation and a Liquor Store.

On September 23rd we wrote the Department of Transportation registering our concern over the potential of them awarding the contract to such a Joint Venture. We were concerned over the concept of a community competing against private construction companies and believed that it was contrary to the principles of free enterprise. A community receives municipal assistance, revenue sharing, grants to purchase equipment, etc, from the state and quite simply a private company cannot compete with any community that is underwritten by state funds - it is indeed very, very unfair competition.

On October 22nd, the Fairbanks office of the Department of Transportation sent the Joint Venture a notice to proceed.

In November, at the annual convention of AGC, Commissioner Hickey indicated that the award to the Joint Venture was

based on an Attorney General opinion which in essence said that there was nothing in law to prevent the Department of Transportation from awarding the contract to the Joint Venture.

In December I called the Department of Transportation to obtain a copy of the Attorney General's opinion. Staff experienced difficulty in locating it. I called the Attorney General's office and requested that they look through their law opinion index for an Opinion issued in September or October under the subject of contracts, bids, contractors, communities or municipalities that would fit the situation. The only opinion they could find that addressed the issue of a community bidding on projects was dated April 7, 1987 and to my surprise it stated in part:

"You have asked whether a municipality may act as a general contractor on a competitively bid public works project. The short answer is no."

DDT/PF subsequently informed us that the Attorney General opinion, that their Fairbanks office had received was not in writing but was a verbal opinion.

As you might guess, we found these revelations and the potential of other communities bidding against private industry quite disturbing.

The question before you today, as policy makers is: As a matter of public policy are political subdivisions going to be allowed to competitively bid against the private sector?

If you have any questions I would be happy to answer them.

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CS SB424
PUBLISH DATE:

REQUEST: FISCAL NOTE

Revision Date:
Title: An Act relating to procurement by state agencies from certain entities.
Sponsor: Jones and Fischer
Requestor: Sturgulewski

Agency Affected: DOT&PF
BRU:

Components:

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTURAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE	0	0	0	0	0	0
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FUNDING: (THOUSANDS OF DOLLARS)

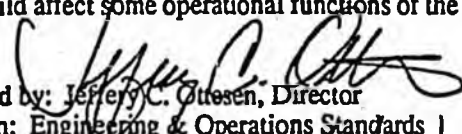
GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
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TOTAL	0	0	0	0	0	0

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ANALYSIS: (Attach a separate page if necessary)

Because of the relatively few examples the department can refer to where a municipality or state agency actively competed for a bid or professional service solicitation, this bill would appear to have minimal or no impact on staffing or cost. It could affect some operational functions of the department, which are further described on the next page.

Prepared by:  Jeffrey C. Ottosen, Director
Division: Engineering & Operations Standards

Phone: 465-2951
Date: Feb. 29, 1988

Approved by Commissioner: 
Agency: Department of Transportation and Public Facilities

Date: 3/1/88

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Currently, the department has a number of relatively small operational-type contracts with other governmental agencies for a variety of purposes. These include contracts with local communities for docking of Marine Highway Vessels, terminal operations and ticketing for the Marine Highway system and contracts for maintenance and operations of airports and road systems. Other examples of disallowed inter-governmental contracting may occur depending on how the bill is interpreted. For example, if the department procures shipyard services at locations such as Ketchikan or Seward we may be viewed as being in violation of this proposed law. As each city controls a major shipyard, though leased to a shipyard service firm, legal questions may be raised as to an implied partnership or joint venture on the part of the city which owns or leases the shipyard facilities. A further potential conflict is with the anticipated selection of a southern terminus for the Alaska Marine Highway System. Many of the likely candidate sites involve a governmental entity, including the Alaska community of Hyder.

We believe the principal intent of this bill – to prevent governmental entities from competing in the construction arena – could be served while avoiding the types of conflicts described above with a simple language change. We suggest that the sentence on line 11 be amended as shown:

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Original sponsors: Jones, Fischer,
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3 CS FOR SENATE BILL NO. 424 (C&RA)
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BOX 92800 • ANCHORAGE ALASKA 99509
TELEPHONE (907) 561-8354



3101 SPENARD ROAD
ANCHORAGE
WILLIAM E. SCHNEIDER
EXECUTIVE DIRECTOR

January 27, 1988

Mark Hickey, Commissioner
Department of Transportation &
Public Facilities
3132 Channel Drive
P.O. Box 2
Juneau, Alaska 99811

Re: Kotzebue Airport Project

Dear Commissioner Hickey,

On behalf of the contracting community in Alaska, AGC requests your response to un-resolved issues surrounding the award of a \$1.8 million Kotzebue Airport improvement project to a joint venture comprised in part by a political subdivision of the State.

This circumstance continues to warrant our attention because we believe a system which allows non-profit tax exempt political subdivisions of the State to bid on a competitive basis against private business undermines the free enterprise system on which this country and this State are founded.

In November 1987, at the AGC annual convention, you indicated that the award to the joint venture KIC Corporation /R. & S. Stores/City of Kotzebue (herein after referred to as the City of Kotzebue) was based on an attorney general's opinion. I am not certain you indicated a written opinion, but the audience assumed that to be the case.

I now understand the facts to be different. First, there was no written attorney general's opinion recommending project award to the City of Kotzebue. Second, a written attorney general's opinion was issued in a memorandum dated April 7, 1987 succinctly stating that a municipality may not act as a general contractor on a competitively bid public works project.

Commissioner Hickey
Page 2

The October 12, 1987 Intent to Award letter by DOT/PF Regional Director Lynn Harnish directly contradicts this April 7, 1987 attorney general's opinion. Harnish states in part:

There is no law which prohibits a municipality from bidding on a public works project as a joint venture with other contractors. Article X, paragraph 1 provides that "a liberal construction shall be given to the powers of local government units." A.S. 29.35.010(B) allows a municipality to enter into agreement. Considering the broad construction of powers by municipalities required by the constitution and by statute (A.S. 29.35.400 and A.S. 29.35.410), I am unable to conclude that it is illegal for the City of Kotzebue to enter into a joint venture agreement for the purpose of bidding on State construction contract, and the DOT/PF is obligated by A.S. 35.15.050 to award to the lowest responsible bidder regardless of considerations of policy.

The April 7, 1987 attorney general memorandum states in part:

You have asked whether a municipality may act as a general contractor on a competitively bid public works project. The short answer is no. Finally as we noted earlier, powers given local governments are liberally construed. (Citations omitted) In this instance, municipalities are not given the authority to compete as a general contractor for public works projects. Thus, if a municipality were to adopt such a power, it would have to be implied. "[I]nsofar as municipal corporations do possess implied powers, such powers are to be strictly construed against the entity claiming them." (Citations omitted) Given this rule, a municipality would be barred from asserting implied powers so as to involve itself as a general contractor on a competitively bid public works project.

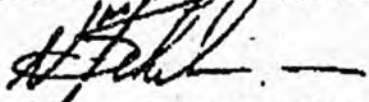
Commissioner Hickey
Page 3

As you might guess, we find these revelations to be quite disturbing. Our concern is for the future. Are tax exempt political subdivisions going to be allowed to compete against the private sector? Will DOT/PF ignore the April 7, 1987 attorney general opinion if a similar situation occurs in the future?

I am sure you understand our concerns. Can you please indicate what if anything, DOT/PF plans on doing to address these concerns.

Sincerely,

ALASKA CHAPTER
ASSOCIATED GENERAL CONTRACTORS



William E. Schneider
Executive Director

WES/mjc

\\WES\HICKEY.LTR

STATE OF ALASKA

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES
NORTHERN REGION, DESIGN AND CONSTRUCTION

STEVE COWPER, GOVERNOR

2301 Peger Road
Fairbanks, Alaska 99709-6394
(907) 451-2200

October 22, 1987

Re: Project No. AIP 3-02-0160-04/60434
Kotzebue Airport Improvements

NOTICE TO PROCEED

EXPRESS MAIL NO. B26617136
RETURN RECEIPT REQUESTED

Kotzebue/K.I.C./R & S Store, Inc. J.V.
P.O. Box 46
Kotzebue, Alaska 99752

Gentlemen:

The Federal Aviation Administration has reviewed and approved the contract documents for the referenced project. You are hereby directed to proceed with the work called for under this contract. The effective date of this Notice to Proceed is October 22, 1987. Contract completion date is October 31, 1988.

Please address future correspondence to Ron Davena, Western District Engineering Manager, Department of Transportation & Public Facilities, P.O. Box 1048, Nome, Alaska 99762 or his designee.

Sincerely,



Elizabeth L. Engle, P.E.
Director, Design and Construction
Northern Region
Contracting Officer

SPL/dv

RECEIVED
OCT 26 1987
Associated General Contractors

STATE OF ALASKA

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

NORTHERN REGION, REGIONAL DIRECTOR

STEVE COWPER, GOVERNOR

2301 PEGER ROAD
FAIRBANKS, ALASKA 99709-6218
PHONE: (907) 451-2210

October 12, 1987

Re: Kotzebue Airport Improvements
Project No. 60434

Brown Construction
P.O. Box 1313
Kenai, Alaska 99611

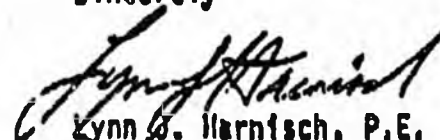
Kotzebue/KIC/R & S Stores, Inc., J.V.
P.O. Box 46
Kotzebue, Alaska 99762

Gentlemen:

Having considered the bid protest of Brown Construction, and reviewing the materials submitted by Brown Construction and Kotzebue/KIC/R & S Stores, JV, it is my decision to deny the bid protest. There is no law which prohibits a municipality from bidding on a public works project as a joint venture with other contractors. Article X, paragraph 1 provides that "a liberal construction shall be given to the powers of local government units." A.S. 29.35.010(B) allows a municipality to enter into agreements. Considering the broad construction of powers by municipalities required by the constitution and by statute (A.S. 29.35.400 and A.S. 29.35.410), I am unable to conclude that it is illegal for the City of Kotzebue to enter into a joint venture agreement for the purpose of bidding on a state construction contract, and the DOT&PF is obligated by A.S. 35.15.050 to award to the lowest responsible bidder regardless of considerations of policy. It is for the legislature to determine whether, as a matter of policy, governmental entities should be permitted to compete for public contracts.

The contract for Project No. 60434 will be awarded to Kotzebue/KIC/R&S Stores, JV. It is expected that the contract award will be made on October 14, 1987.

Sincerely



Lynn G. Harnisch, P.E.
Regional Director
Northern Region

hm

**BROWN CONSTRUCTION COMPANY, INC.**

GENERAL CONTRACTOR
BOX 1313 - KENAI, ALASKA 99611
(907) 283-9408

September 18, 1987

Mr. Robert Venusti
Department of Transportation/PF
Technical Services Bldg.
2301 Peger Road
Fairbanks, Alaska 99709-6364

Re: Notice of Bid Protest
Ralph Wien Memorial Airport
AIP NO.-3-02-0160-04
Project No.: 60434

Dear Robert Venusti:

This letter is a formal bid protest for the Kotzebue Airport Project which was tentatively awarded to the City of Kotzebue/K.I.C./R&S Stone, Inc., a Joint Venture. As of September 17, 1987, no notice of "intent to award" had been issued.

I feel that the inclusion of the "City of Kotzebue" as a Joint Venture partner for a construction project may; (1) be a conflict of interest, (2) give "unfair competitive advantage" to K.I.C./R&S Stone, Inc. in obtaining the contract, (3) undercut the competitive bid process, (4) possibly misuse public funds for private gain, and (5) make the bid "unresponsive."

The apparent ability of K.I.C./R&S. Stone, Inc. to use city owned equipment and rely on city funds for bonding clearly seems inappropriate, to say the least. The bid bond for the project was posted by the City of Kotzebue. See Exhibit B. It usually takes a licensed General Contractor with a proven track record to obtain the proper bonds to perform contracts such as the Kotzebue Airport Project. The use of "city funds" to provide bonding undercuts other contractors' abilities to compete on a fair basis. Brown maintains that the low bid submitted by the Joint Venture reflects the advantage gained by including a municipal entity in the partnership. (Brown's Bid \$2,262,911.00 - Joint Venture's Bid \$1,791,501.00.) The municipality's participation creates the definite appearance of a "conflict of interest."

Mr. Robert Venusti
September 18, 1987
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If Brown Construction Inc. had known that the City of Kotzebue was going to be a participant in the bidding process, Brown would never have gone to the expense of preparing a bid in the first place. The participation of the "City of Kotzebue" cannot be found on the planholders list. See Exhibit C. The use of "city funds" seemingly allows a private individual, i.e., Joint Venture partners, to profit with the use of funds which are derived from the citizens of Koztebue (Public Funds). The use of such funds could provide the basis for an injunction to prohibit the City of Kotzebue from using any funds on the project.

In addition, any proposed use of city owned equipment by the Joint Venture adds to the "unfair advantage" gained at the expense of other bidders. The DOT/PF should also note that all Joint Venture partners have agreed to sign for bonding on the project. See Proposal submitted to DOT/PF by Joint Venture (Exhibit A). The DOT/PF should determine whether or not a surety will even bond an unlicensed municipality involved in a joint venture. The unfair advantage which the Joint Venture has over other contractors becomes even more apparent if the City of Kotzebue intends to furnish a cash bond for the Joint Venture. All other contractors that cannot rely on municipal funds are put at a disadvantage since commercial sureties or private cash bonds must be relied upon by non-municipal entities. The DOT/PF could end up using the municipal funds, i.e. cash bond, to complete the project, in the event of incomplete performance on behalf of the contractor.

The DOT/PF may find it useful to review the Joint Venture agreement between the parties in order to clarify some of the issues mentioned above. A Joint Venture similiar to the Kotzebue/K.I.C/ R & S Stone Inc. is required to keep a copy of the agreement on file at each parties main place of business. See 12 AAC 21.010, Joint Venture Agreement, A.S. 08.18.011. Also see Exhibit D.

If a precedent is set which allows "municipalities" to compete against private enterprise in the construction business, the competitive bid process will ultimately suffer as will the individual contractor. Brown requests that DOT/PF reject the Joint Venture's bid and accept the next lowest bid which was prepared in accordance with recognized standards for bidding on public projects. Please contact me concerning DOT/PF's position on this matter immediately.

Very truly yours,

Don Brown



SKILL
RESPONSIBILITY
INTEGRITY

THE ALASKA CHAPTER
**ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, INC.**

BOX 92500 • ANCHORAGE, ALASKA 99509
TELEPHONE (907) 561-5354



3201 SPENARD ROAD
ANCHORAGE
WILLIAM E. SCHNEIDER
EXECUTIVE DIRECTOR

September 23, 1987

Mark Hickey, Commissioner
Department of Transportation
and Public Facilities
P.O. Box 2
Juneau, Alaska 99811

Dear Commissioner Hickey:

I am writing to register concern over the facts surrounding the bids for the improvements to Kotzebue's Ralph Wien Memorial Airport, DOT/PF Project No. 60434 AIP No. 3-02-0160-04.

The apparent low bidder on this \$1.8 million project includes the City of Kotzebue as a joint venture partner. To my knowledge this is the first time a political subdivision of the State has bid on a DOT/PF project.

The concept of a non-profit public corporation competing against private construction companies is contrary to principles of free enterprise. Quite simply, a private company cannot compete with a non-profit, non-taxable public entity which utilizes publicly owned and non-taxable equipment.

AGC Alaska requests a through investigation by DOT/PF into the responsiveness and appropriateness of this bid. Additionally, the capability of the joint venture to bond this project should be reviewed.

DEC-22-87 TUE 17:20

P. 03

Mark Hickey, Commissioner
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Please keep me advised of your actions in this matter.

Sincerely,

ALASKA CHAPTER OF
ASSOCIATED GENERAL CONTRACTORS



Patrick J. Steward
President

cc: Lynn Harnisch, Regional Director
DOT/PF - Northern Region
AGC Board of Directors
Senator Jan Faiks
Representative Ben F. Grussendorf

WFR/mjc

MEMORANDUM

State of Alaska

TO: Marty Rutherford, Director
Municipal & Regional Asst. Div.
Dept. of Community & Regional
Affairs

DATE: April 7, 1987

FILE NO: 663-87-0189

TELEPHONE NO: 465-3600

FROM: Grace Berg Schaible
Attorney General

SUBJECT: Municipality as general contractor for public works project

Marjorie L. Odland
Thru: Marjorie L. Odland
Assistant Attorney General
Governmental Affairs-Juneau

Bruce Weyhrauch
By: Bruce Weyhrauch
Legal Assistant
Governmental Affairs-Juneau

You have asked whether a municipality may act as a general contractor on a competitively bid public works project. The short answer is no.

We have previously opined that municipalities performing work on public works projects, a practice commonly referred to as "forced accounting," are not required to pay prevailing wages under AS 36.05.010 -- 36.05.110 (Little Davis Bacon Act). 1983 Inf. Op. Att'y Gen. (Apr. 19; 663-83-0554). See 1983 Inf. Op. Att'y Gen. (Mar. 11; 663-83-0267). We have also approved of situations where municipalities carry out their public construction projects by hiring private contractors to perform project management and supervision while using municipal employees to do the construction work. 1978 Inf. Op. Att'y Gen. (Oct. 11; 663-79-0195). However, none of these opinions address the question posed. Based upon our analysis, we find that a municipality may not act as a general contractor on competitively bid public works projects.

Generally, the policy of the Department of Transportation and Public Facilities (DOT/PF) is "to require the construction of all public works under bid contracts." AS 35.15.010. Public work contracts are required to comply with Title 35, AS 36.30 (the State Procurement Code), and regulations adopted under those laws. AS 35.15.040. ^{1/} Contractor is defined as "the contractor including subcontractors performing work necessary to

^{1/} The effective date of AS 35.15.040 and AS 36.30 is July 1, 1987.

Marty Rutherford, Director
Municipal & Regional Asst. Div.
Dept. of Community & Regional Affairs

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facilitate public construction." AS 36.95.010(1). 2/ DOT/PF is given the authority to "enter into contracts or agreements relating to public works with ... political subdivisions...." AS 35.-05.040(7).

Basically, the legislature has provided three ways for the construction of public works projects. First, if a project is estimated to cost less than \$100,000, or if it is in the best interests of the state, DOT/PF may perform the work. AS 35.15.-010. Second, when the estimated construction costs exceed \$100,000, DOT/PF must advertise, request bids, and award contracts competitively. See AS 35.15.020 -- 35.15.050. Third, a municipality can request DOT/PF to give the municipality all the authority to plan and construct "public works projects of the state which [are] to be located within the boundaries or the operating area of the municipality...." AS 35.15.080(a). See 1981 Inf. Op. Att'y Gen. (May 29; 663-81-0044).

Nothing in Alaska law specifically prohibits municipalities from acting as a general contractor on competitively bid contracts. And, the powers given local government units are to be liberally construed. See Alaska Const. art. X, § 1; AS 29.-35.400. Yet, if an affirmative response is given to your question, ostensibly, a municipality could bid on all kinds of public works projects in all areas of the state, just like any other general contractor. We believe the legislature did not intend to give municipalities this authority. By specifically bestowing upon a municipality the authority to "adopt" the planning and construction of public works projects located within the boundaries of the municipality under AS 35.15.080 the legislature intended to give municipalities the authority to carry out public works projects without competition. Similarly, the legislature constrained municipalities to assume the construction of relevant public works projects only within the boundary or operating area of the municipality. AS 35.15.080(a). By implication, a municipi-

2/ AS 39.95.010(3) defines public works as "the on-site field surveying, erection, rehabilitation, alteration, extension or repair, including painting or redecoration of buildings, highways or other improvements to real property under contract for the state, a political subdivision of the state, or a regional school board...." AS 35.25.020(7) defines public work as "a structure or project constructed or maintained by [DOT/PF] except airports and highways and includes public buildings, boat harbors, port facilities, dikes, jetties, and breakwaters." A political subdivision of the state includes boroughs, cities, and villages. AS 36.95.010(6).

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Municipal & Regional Asst. Div.
Dept. of Community & Regional Affairs

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pality venturing outside its boundaries to compete with the private sector for public works projects would be engaging in an ultra vires act, because this action is neither allowed by statute nor by municipal charter. Cochran v. City of Nome, 10 Alaska 425, 435 (D.C. Alaska 1944). See 10 E. McQuillin, The Law of Municipal Corporations § 29.104c (3d ed. 1981); 3A C. Antieau, Independent Local Government Entities § 30B.08 (1987) ("Ultra vires contracts are agreements beyond the borough's power under all circumstances."). See generally 72 C.J.S. Supp. Public Contracts § 4 (1975). On a practical level a municipality competitively bidding against private sector contractors would, in all probability, cause quite a political fuss and raise numerous logistic, ethical, and practical problems for the municipality.

Finally, as we noted earlier, powers given local governments are liberally construed. E.g., Liberati v. Bristol Bay Borough, 584 P.2d 1115, 1120 (Alaska 1979). In this instance, municipalities are not given the authority to compete as a general contractor for public works projects. Thus, if a municipality were to adopt such a power, it would have to be implied. "[I]nsofar as municipal corporations do possess implied powers, such powers are to be strictly construed against the entity claiming them." Girves v. Kenai Peninsula Borough, 536 P.2d 1221, 1224 (Alaska 1975) (footnote omitted). Given this rule, a municipality would be barred from asserting implied powers so as to involve itself as a general contractor on a competitively bid public works project.

Notwithstanding this conclusion, municipalities are not completely barred from competing with members of the private sector, such as general contractors.

Engaging in enterprises usually owned and operated by private individuals has also been sanctioned provided the public interest so requires. The opinion has been given that as long as the city refrains from extending its activity into active competition with private enterprise in dealing with others, it should be allowed considerable latitude in providing for itself those things necessary to carry on a legitimate municipal function if there are valid reasons for becoming a self-supplier. The word "private," as used in the opinions discussing the powers of a municipality, is used to designate proprietary as distinguished from governmental functions.

12 E. McQuillin, The Law of Municipal Corporations § 36.02 (3d

Marty Rutherford, Director
Municipal & Regional Asst. Div.
Dept. of Community & Regional Affairs

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ed. 1986) (emphasis added, footnotes omitted). But that competi-
tion is limited by what the legislature allows.

A municipal corporation is invested with full power to do everything necessarily incident to a proper discharge of its public functions, but no right to do more can be implied, and in the absence of express legislative sanction, it has no authority to engage in any independent business enterprise or occupation such as is usually pursued by private individuals.

Ravettino v. City of San Diego, 160 P.2d 52, 56 (Cal. 1945) (emphasis added). Accord Ace Ambulance Service, Inc. v. City of Augusta, 337 A.2d 661 (Me. 1975); Keeter v. Town of Lake Lure, 141 S.E.2d 634, 643 (N.C. 1965). See Stanley v. Dept. of Conservation & Dev., 199 S.E.2d 641, 652 (N.C. 1973) ("A municipal corporation ... even with legislative sanction, cannot engage in a private enterprise or assume any function which is not in a legal sense public in nature.").

We hope this answers your question. If we can be of further assistance, please feel free to call.

BW/pjg

cc: Michael Cushing, Planner
DCRA/MARAD - Juneau

Michael Favoliero, City Manager
Hoonah

Robert M. Maynard, Esq.
Assistant Attorney General
Dept. of Law - Juneau